

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JAMES E. ROJO,
CDCR #J-53355,

Plaintiff,

vs.

D. PARAMO, Warden; A. HERNANDEZ,
Deputy Warden; Mr. BEARD, Secretary
CDCR; JONES, Correctional Officer;
SMITH, Correctional Officer;
Dr. M. GARIKAPARTHI,

Defendants.

Civil No. 13cv2237 LAB (BGS)

**ORDER OVERRULING
PLAINTIFF'S OBJECTIONS,
DENYING RECONSIDERATION
AND DISMISSING THIRD
AMENDED COMPLAINT
FOR FAILING TO STATE
A CLAIM PURSUANT
TO 28 U.S.C. § 1915(e)(2)(B)(ii)
AND § 1915A(b)(1)
(ECF Doc. No. 22)**

I. Procedural History

On May 8, 2013, James E. Rojo (“Plaintiff”), a state prisoner currently incarcerated at the Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California and proceeding pro se, initiated this civil action pursuant to 42 U.S.C. § 1983 in the Northern District of California.

On September 17, 2013, United States District Judge William H. Orrick determined that Plaintiff’s claims arose at RJD; therefore, venue was proper in the Southern District of California and the matter was transferred here pursuant to 28 U.S.C. §§ 84(d), 1391(b) and 1406(a) (ECF Doc. No. 8). Judge Orrick did not rule on Plaintiff’s Motion to Proceed *In Forma*

1 *Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a), nor did he screen Plaintiff’s Complaint
 2 pursuant to 28 U.S.C. § 1915(e)(2) or § 1915A prior to transfer.

3 On October 25, 2013, this Court granted Plaintiff’s Motion to Proceed IFP, but
 4 simultaneously dismissed his Complaint for failing to state a claim upon which relief could be
 5 granted pursuant to 28 U.S.C. § 1915(e)(2) & 1915A(b) (ECF Doc. No. 11). Specifically, the
 6 Court dismissed Plaintiff’s claims against RJD on Eleventh Amendment grounds, *id.* at 5,
 7 dismissed his claims against the Director/Secretary of the CDCR and RJD Wardens Paramo and
 8 Hernandez because Plaintiff failed to allege any individualized wrongdoing on their parts, *id.*
 9 at 5-6, dismissed his allegations of verbal harassment on the part of Correctional Officers Smith
 10 and Jones because he failed to allege facts which might give rise to an Eighth Amendment
 11 violation, *id.* at 6, and dismissed Plaintiff’s vague mention of “being denied medical treatment”
 12 and deprived of his property because his Complaint contained only “naked assertions” and no
 13 “further factual enhancement” sufficient to state a plausible claim for relief under either the
 14 Eighth or Fourteenth Amendments. *Id.* at 7-8. Plaintiff was granted leave to file an Amended
 15 Complaint in order to correct the deficiencies identified in the Court’s Order. *Id.* at 8-9.

16 Plaintiff filed a First Amended Complaint (“FAC”) (ECF Doc. No. 13), but it too was
 17 dismissed sua sponte for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2) and §
 18 1915A(b) (ECF Doc. No. 14). Because Plaintiff’s FAC continued to name RJD, its Wardens,
 19 and the Secretary of the CDCR as Defendants, and continued to suffer from the same pleading
 20 problems noted in the Court’s October 25, 2013 Order, it was dismissed for failing to state a
 21 claim upon which relief can be granted. *Id.* at 7. To the extent Plaintiff appeared, for the first
 22 time, to specifically challenge the validity of a three-month stint in Administrative Segregation,
 23 however, he was advised of the pleading requirements necessary to show a liberty interest under
 24 the Fourteenth Amendment and *Sandin v. Conner*, 515 U.S. 472, 481-84 (1995), and provided
 25 another opportunity to amend. *Id.* at 5-7.

26 On May 16, 2014, Plaintiff filed his Second Amended Complaint (“SAC”) (ECF Doc.
 27 No. 15), which re-named all previously named parties except RJD, and added an additional
 28

1 defendant, Dr. M. Garikaparthi. *See* SAC at 1, 2. Two weeks later, on May 30, 2014, Plaintiff
 2 also submitted a Motion for Preliminary Injunction (ECF Doc. No. 20).

3 On June 10, 2014, the Court denied Plaintiff's Motion for Preliminary Injunction,
 4 screened his Second Amended Complaint, and dismissed it in its entirety for continuing to fail
 5 to state *any* claim upon which § 1983 relief could be granted against *any* named Defendant. *See*
 6 June 10, 2014 Order (ECF Doc. No. 21). Specifically, the Court dismissed all claims previously
 7 alleged against R.J. Donovan State Prison, D. Paramo, Warden, A. or Alan Hernandez, Deputy
 8 Warden, J. Beard, Director/Secretary of the CDCR, D. Jones, and D. Smith, Correctional
 9 Officers, and Plaintiff's inadequate medical treatment claims against Dr. M. Garikaparthi
 10 without further leave to amend. *Id.* at 11-12. Because Plaintiff had not been previously
 11 apprised of his deficiencies of pleading regarding one newly added claim of retaliation against
 12 Defendant Garikaparthi, however, the Court granted Plaintiff "one final opportunity to amend
 13 *this* claim against *this* Defendant only." *Id.* at 9-10 (emphasis original). Plaintiff was ordered
 14 not to "include any additional claims against Garikaparthi or any other party," denied leave to
 15 add any new parties, and cautioned that his failure "to adhere to the directions set forth in [the
 16 Court's] Order," would result in dismissal of the entire action without further leave to amend for
 17 failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). *Id.* at 12.

18 In response, Plaintiff filed a document entitled "Respond to Order of 6-10-14 Third
 19 Amended Complain[t] and Objections to the Court[']s Order" which the Court will liberally
 20 construe as both a request for reconsideration of the Court's June 10, 2014 Order as well as his
 21 Third Amended Complaint ("TAC") (ECF Doc. No. 22).

22 II. "Objections" and Reconsideration

23 While the Federal Rules of Civil Procedure do not expressly provide for motions for
 24 reconsideration, the Court may reconsider matters previously decided under Rule 59(e) or Rule
 25 60(b). *See Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989); *In re Arrowhead Estates*
 26 *Development Co.*, 42 F.3d 1306, 1311 (9th Cir. 1994). In *Osterneck*, the Supreme Court stated
 27 that a ruling may be re-considered under Rule 59(e) motion where it involves "'matters properly
 28 encompassed in a [previous] decision on the merits.'" 489 U.S. at 174 (quoting *White v. New*

1 *Hampshire Dep’t of Employ’t Sec.*, 455 U.S. 445, 451 (1982)). Reconsideration is generally
 2 appropriate only if the district court “(1) is presented with newly discovered evidence,
 3 (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an
 4 intervening change in controlling law.” *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263
 5 (9th Cir. 1993) (citations omitted).

6 Plaintiff appears to object to the Court’s prior Orders finding he failed to state a claim
 7 against Warden Paramo and Deputy Warden Hernandez on grounds that they “were aware that
 8 plaintiff was not guilty of the charges that put him into Administrative Segregation.” *See* TAC
 9 at 1-2. He further seeks to “submit documentation” to show that Officers Smith and Jones
 10 “acted under color of state authority” and “tr[ied] to have inmates attack [him].” *Id.* at 2-3.
 11 Finally, Plaintiff claims he continues to suffer from various medical ailments for which Dr.
 12 Garikaparthi “has failed to administer the necessary medical . . . care.” *Id.* at 4. As noted above,
 13 however, the Court has already twice considered and dismissed due process claims related to
 14 Plaintiff’s segregation, and all his Eighth Amendment claims, only after apprising him of his
 15 pleadings deficiencies and giving him ample opportunity to correct them. *See* Oct. 25, 2014
 16 Order (ECF Doc. No. 11); April 23, 2014 Order (ECF Doc. No. 14). It was only after Plaintiff
 17 failed for a third time to plead a claim to relief as to any of these allegations that was “plausible
 18 on its face,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), that the Court denied him further leave
 19 to amend. *See Gonzalez v. Planned Parenthood*, 759, F.3d 1112, 1119 (9th Cir. 2014) (noting
 20 that district court’s discretion in denying amendment is “‘particularly broad’ when it has
 21 previously given leave to amend.”) (citation omitted).

22 The objections Plaintiff’s raises in his TAC offer no “further factual enhancement”
 23 sufficient to state any plausible claim for relief. *Iqbal*, 556 U.S. at 679. And while the Court
 24 has continually construed all of Plaintiff’s pleadings liberally and in the light most favorable to
 25 him, *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010), it simply may not “supply
 26 essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents of University
 27 of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

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1 Thus, because Plaintiff's has failed to present the Court with any newly discovered
 2 evidence, has identified no clear error, demonstrated no manifest injustice, and has pointed to
 3 no intervening change in controlling law, *see School Dist. No. 1J*, 5 F.3d at 1263, his objections
 4 are overruled and his request for reconsideration is DENIED.

5 **III. Sua Sponte Screening Pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

6 **A. Standard of Review**

7 As Plaintiff is now well aware, the Prison Litigation Reform Act ("PLRA") requires the
 8 Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who
 9 are "incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated
 10 delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial
 11 release, or diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C.
 12 §§ 1915(e)(2) and 1915A(b). Under the PLRA, the Court must sua sponte dismiss complaints,
 13 or any portions thereof, which are frivolous, malicious, fail to state a claim, or which seek
 14 damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez*
 15 *v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*,
 16 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

17 Plaintiff's TAC, like his previous complaints, must contain "a short and plain statement
 18 of the claim showing that the pleader is entitled to relief." FED.R.CIV.P. 8(a)(2). Detailed
 19 factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of
 20 action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing
 21 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Determining whether a complaint
 22 states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court
 23 to draw on its judicial experience and common sense." *Id.* The "mere possibility of misconduct"
 24 falls short of meeting this plausibility standard. *Id.*

25 "When there are well-pleaded factual allegations, a court should assume their veracity,
 26 and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S.
 27 at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) ("[W]hen determining
 28 whether a complaint states a claim, a court must accept as true all allegations of material fact and

1 must construe those facts in the light most favorable to the plaintiff.”); *Barren v. Harrington*,
 2 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) “parallels the language of Federal
 3 Rule of Civil Procedure 12(b)(6)”).

4 And while the court has noted its obligation in pro se cases to construe the pleadings
 5 liberally and to “afford the petitioner the benefit of any doubt,” *Hebbe*, 627 F.3d at 342 & n.7,
 6 “vague and conclusory allegations of official participation in civil rights violations” remain
 7 insufficient to state a claim upon which § 1983 relief may be granted. *Ivey*, 673 F.2d at 268.

8 **B. Plaintiff’s Third Amended Complaint**

9 While the Court’s June 10, 2014 Order denied Plaintiff leave to further amend most of
 10 his claims, he was granted leave to file a Third Amended Complaint in order to correct his
 11 deficiencies of pleading a claim for retaliation against Dr. Garikaparthi. See June 10, 2014
 12 Order at 8-10. Plaintiff was advised that “[w]ithin the prison context, a viable claim of First
 13 Amendment retaliation entails five basic elements: (1) an assertion that a state actor took some
 14 adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that
 15 such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action
 16 did not reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559,
 17 567-68 (9th Cir. 2005) (footnote omitted). Plaintiff was further cautioned that retaliation is not
 18 established simply by pointing to adverse action following protected speech, and that in addition
 19 he must allege facts to plausibly suggest a nexus between the two. See *Huskey v. City of San*
 20 *Jose*, 204 F.3d 893, 899 (9th Cir. 2000).

21 In his TAC, Plaintiff continues to claim he “filed [a claim] with the medical board”
 22 regarding arguments he had with Garikaparthi’s as to his medical prescriptions, and that
 23 Garikaparthi “started advising other doctors . . . not to issue anything that would help
 24 [Plaintiff’s] pain.” See TAC at 4. But that’s all he says, and he still fails to offer any facts from
 25 which a reasonable inference might be drawn that Garikaparthi took adverse action against him
 26 because he had engaged in protected conduct. See *Wood v. Yordy*, 753 F.3d 899, 904-05 (9th
 27 Cir. 2014) (finding “mere speculation that defendants acted out of retaliation” insufficient);
 28 *Soriano’s Gasco Inc. v. Morgan*, 874 F.3d 1310, 1314 (9th Cir. 1995) (plaintiff’s protected

1 conduct must be the “substantial or “motivating” factor in defendant’s decision to act); *Iqbal*,
 2 556 U.S. at 678 (“A claim has facial plausibility when the plaintiff pleads factual content that
 3 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
 4 alleged.”). In addition, Plaintiff still fails to explain how he was “chilled” by Garikaparthi’s
 5 actions, *see Rhodes*, 408 F.3d at 568 n.11, or claim that any of Garikaparthi’s decisions failed
 6 to advance a legitimate penal interest. *See Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir.
 7 1994 (per curiam) (retaliatory action must be alleged to have “advanced no legitimate
 8 penological interest.”).

9 Thus, for all these reasons, the Court finds Plaintiff’s TAC still fails to state a retaliation
 10 claim against Dr. Garikaparthi upon which relief can be granted, and therefore it requires
 11 dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1). *See Lopez*, 203 F.3d at
 12 1126-27; *Rhodes*, 621 F.3d at 1004. Because Plaintiff has already been provided an opportunity
 13 to amend this claim, as well as all his other previously pleaded claims on several occasions, but
 14 to no avail, the Court finds further leave to amend at this juncture would simply be futile. *See*
 15 *Gonzalez*, 759 F.3d at 1116 (“Futility of amendment can, by itself, justify the denial of . . . leave
 16 to amend.”) (quoting *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)).

17 **IV. Conclusion and Order**

18 For the reasons set forth above, IT IS HEREBY ORDERED that:

19 1) Plaintiff’s Objections to the Court’s June 10, 2014 Order are OVERRULED,
 20 reconsideration is DENIED, and Plaintiff’s Third Amended Complaint (ECF Doc. No. 22) is
 21 DISMISSED for failing to state a claim upon which § 1983 relief may be granted without further
 22 leave to amend pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1).

23 2) The Court further CERTIFIES that an IFP appeal from this final Order of dismissal
 24 would not be taken “in good faith” pursuant to 28 U.S.C. § 1915(a)(3). *See Coppedge v. United*
 25 *States*, 369 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977) (indigent
 26 appellant is permitted to proceed IFP on appeal only if appeal would not be frivolous).

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The Clerk shall close the file.

DATED: November 14, 2014

Larry A. Bunn

HONORABLE LARRY ALAN BURNS
United States District Judge